

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

NO. CR01-108R

V.

STEVEN C. MORELAND,

Defendant.

ORDER WITHDRAWING MAY 26,
2005 ORDER GRANTING IN
PART GOVERNMENT'S MOTION
FOR A PSYCHOLOGICAL EVALUA-
TION; STRIKING PROPOSED ORDER
AND MOTION FOR CLARIFICATION;
AND SCHEDULING SENTENCING
HEARING

I. INTRODUCTION

This matter comes before the court on remand from the Ninth Circuit of defendant Steven Moreland's sentence, for further proceedings in light of the Supreme Court's ruling in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). Currently pending before the court are: (1) the parties' memoranda re: procedures on remand; (2) the government's Proposed Order for Psychological Evaluation, and Moreland's objections thereto; and (3) Moreland's Motion to Clarify Order and for Protective Order Re: Medical Files. Also bearing further consideration is this court's May 26, 2005 Order Granting in Part Government's Motion

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1 for Psychological Evaluation.

2 II. BACKGROUND

3 In August 2002, after a seven-week trial, a jury found
4 Steven Moreland guilty of fourteen counts of conspiracy, mail
5 fraud, wire fraud, and money laundering.

6 In preparation for Moreland's sentencing, the U.S. Probation
7 Office submitted a report recommending an offense level of 43
8 with a sentencing range of up to life imprisonment. Moreland
9 offered a report prepared by psychologist Dr. Terri Hastings, who
10 diagnosed Moreland with shared delusional disorder. The govern-
11 ment did not seek or obtain its own expert evaluation of More-
12 land's mental health, choosing instead to challenge the credibil-
13 ity and accuracy of Dr. Hastings' report.

14 On August 22, 2003 this court sentenced Moreland to 292
15 months' imprisonment. The court arrived at this sentence after
16 adopting the presentence report's recommended 43 offense level
17 and granting defendant's motion for a downward departure, finding
18 diminished capacity based in part on Dr. Hastings' report.
19 Arriving ultimately at an offense level of 40, the court sen-
20 tenced Moreland to the low end of that level's 292-to-365-month
21 range.

22 Moreland appealed his conviction and sentence. While More-
23 land's case was pending before the Ninth Circuit, the Supreme
24 Court of the United States decided *Blakely v. Washington*, 124 S.
25 Ct. 2531 (2004), which called into question the status of the
26 U.S. Sentencing Guidelines. On December 15, 2004 the Ninth

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1 Circuit granted Moreland's motion for an order vacating his
2 sentence, and remanded his case "for such further proceedings as
3 the district court deems appropriate under the circumstances."
4 After the Ninth Circuit's remand, the Supreme Court decided
5 *United States v. Booker*, 125 S.Ct. 738 (2005), declaring the
6 sentencing guidelines advisory. In addition, on June 1, 2005 the
7 Ninth Circuit issued its much-anticipated *en banc* ruling in
8 *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) ("Ameline
9 III"), which set forth the procedures by which sentences on
10 appeal would be remanded to trial courts for resentencing under
11 *Booker*. In light of that ruling, and in response to the parties'
12 motions outlined above, the court finds and rules as follows.

III. DISCUSSION

14 *Ameline III* involved a direct appeal of a pre-Booker sen-
15 tence. In that case the Ninth Circuit held that

when [the Court of Appeals is] faced with an unpreserved *Booker* error that may have affected a defendant's substantial rights, and the record is insufficiently clear to conduct a complete plain error analysis, a limited remand to the district court is appropriate for the purpose of ascertaining whether the sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory. If the district court responds affirmatively, the error was prejudicial and failure to notice the error would seriously affect the integrity, fairness and public reputation of the proceedings. The original sentence will be vacated by the district court, and the district court will resentence the defendant. If the district court responds in the negative, the original sentence will stand, subject to appellate review for reasonableness.

25 || Ameline III at 1074-75.

26 While *Ameline III* was decided after the Ninth Circuit

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1 remanded Moreland's sentence for - presumably - full reconsideration, the court finds that incorporating the holding of *Ameline III* into Moreland's appeal is appropriate, and "the shortest, the easiest, the quickest, and the surest" way to safeguard Moreland's constitutional rights. *Ameline III* at 1079. Therefore, the initial issue on remand is "whether the sentence would have been different had the court known that the Guidelines were advisory" rather than mandatory. *Id.* at 1079.

9 The answer to this question is twofold. First, as the court
10 has indicated before, it would not have given (and on remand will
11 not give) Moreland a sentence greater than the one he originally
12 received. At Moreland's sentencing the court made several find-
13 ings at the government's urging resulting in upward adjustments
14 to Moreland's offense level. As the court found at the original
15 sentencing, however, the court again finds under *Booker* and the
16 newly advisory sentencing guidelines that the sentence at which
17 it initially arrived, 292 months, is "sufficient" to achieve the
18 goals of just punishment, deterrence, protection of the public,
19 rehabilitation, and the other criteria set forth in 18 U.S.C.
20 §3553(a).

21 Given this finding - that the court would not in any case
22 have sentenced Moreland to greater than the 292 months he re-
23 ceived - the court finds that a government-obtained psychological
24 evaluation is no longer necessary or relevant to the issues
25 before the court. The May 26, 2005 order authorized such evalua-
26 tion because "[u]nder a regime of the mandatory guidelines, the

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1 government was able to calculate the cost of losing on the mental
2 health capacity issue to a fair degree of certainty. Under the
3 newly conceived *Booker* advisory regime, however, the government's
4 calculations are necessarily far less accurate." May 26, 2005
5 Order at 4. Under *Ameline III*'s new limited remand framework,
6 however, the court finds that the more appropriate approach to
7 resentencing is to represent to the government that its calcula-
8 tions of losing on the mental health issue are as accurate now as
9 they were on initial sentencing, thereby obviating the need for a
10 second evaluation.¹

11 On the other hand, the court is also not inclined to reduce
12 Moreland's sentence in light of the newly advisory nature of the
13 sentencing guidelines. The court, as the parties are aware, was
14 intimately involved in this defendant's case, both throughout the
15 several years and myriad motions of his pretrial proceedings and
16 at trial itself. The court had additional opportunity to become
17 familiar with the "nature and circumstances of the offense and
18 the history and characteristics of the defendant" during his
19 sentencing proceedings. 18 U.S.C. §3553(a). It is difficult to
20

21 ¹The government also moved for a psychological exam on the
22 grounds that the integrity of Dr. Hastings' work was called into
23 question in the course of another trial in the District of
24 Alaska. In that case, the government sought Dr. Hastings' raw
25 data on the suspicion of certain misrepresentations. To the
26 extent that the government's motion was based on concerns about
the integrity of Dr. Hastings' work, the court finds that the
suggestion of impropriety in another, unrelated trial is
insufficient to support authorizing a psychological evaluation in
this case at this time.

1 imagine there are reasonable arguments left that have not already
2 been made by the defendant and considered by the court.

3 Nevertheless, considering the constitutional gravity of the
4 issues at hand, the court finds that erring on the side of giving
5 Moreland a chance to reargue his sentence is the proper course
6 under *Booker* and *Ameline III*. As *Ameline III* provides, "the
7 district court is permitted to take a fresh look at the relevant
8 facts and the Guidelines consistent with *Booker*, the Sentencing
9 Reform Act of 1984, Rule 32 of the Federal Rules of Criminal
10 Procedures, and [*Ameline III*]". *Ameline III* at 1085. Consistent
11 with this pronouncement and the findings above, a hearing on
12 Moreland's resentencing is tentatively scheduled for 10:00 a.m.
13 September 14, 2005.

14 Several issues remain that the court finds appropriate to
15 address before sentencing. First, in his Motion Re: Procedure on
16 Remand, Moreland urges the court to reduce his sentence to the
17 level supported by the jury's findings alone, the so-called "non-
18 Blakely" time, and to rely on certain findings of fact only to
19 move within that range. He relies in essence on the Supreme
20 Court's recent pronouncements that the finding of facts (other
21 than a prior conviction) resulting in an enhancement of a defen-
22 dant's sentence must be made by a jury and not by a judge. See,
23 e.g., Defendant's Motion Re: Procedure of Remand at 2, citing
24 *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and *Apprendi v. New*
25 *Jersey*, 530 U.S. 466 (2000). Defendant misapprehends the effect
26 of these pronouncements on his case. As Justice Breyer's remedial

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1 opinion in *Booker* makes clear, and as the Ninth Circuit noted in
2 *Ameline III*, "[s]tanding alone, judicial consideration of facts
3 and circumstance beyond those found by a jury or admitted by the
4 defendant does not violate the Sixth Amendment right to jury
5 trial. A constitutional infirmity arises only when extra-verdict
6 findings are made in a mandatory guidelines system." *Ameline III*
7 at 1077 (emphasis added); see also *Booker*, 125 S.Ct. at 750 ("If
8 the Guidelines as currently written could be read as merely
9 advisory provisions that recommended, rather than required, the
10 selection of particular sentences in response to different sets
11 of facts, their use would not implicate the Sixth Amendment.").
12 *Booker et al.* simply do not require summarily voiding that
13 portion of Moreland's sentence that exceeds the so-called non-
14 *Blakely* time.

15 The court further clarifies that at the hearing it will not
16 entertain proffers of evidence, new or old. Moreland asks for an
17 opportunity to relitigate certain facts, including those the
18 court found resulting in upward departures. Nothing in *Ameline*
19 *III* or *Booker* - in particular, its remedial opinion - indicates
20 that any more than a review of the facts as already proffered is
21 constitutionally required on remand. The Ninth Circuit studiously
22 avoids requiring the district court to hear new evidence on
23 resentencing, prescribing only that the court "take a fresh look
24 at the relevant facts." *Ameline III* at 1085. Moreover, as a
25 logical matter, Moreland had every bit as much incentive to
26 establish certain mitigating facts before *Booker* was decided as

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1 he does now.

2 Instead, at issue is the weight that the parties believe
3 should be given to the various factors this court is to consider
4 in calculating Moreland's sentence, including the advisory
5 guidelines themselves and those criteria enumerated at 18 U.S.C.
6 §3553(a). Again, the parties should bear in mind *Ameline III*'s
7 clarification that "[s]tanding alone, judicial consideration of
8 facts and circumstances beyond those found by a jury or admitted
9 by the defendant does not violate the Sixth Amendment right to
10 jury trial." *Ameline III* at 1077-78.

11 Finally, the parties are in disagreement as to what standard
12 of proof the court should employ in making findings of fact at
13 sentencing. The government posits that nothing in *Blakely* or
14 *Booker* requires ratcheting up the standard of proof. While
15 Moreland urges the court to find that *Booker* and its related
16 cases impose a new standard on judges' findings of fact on
17 related conduct, he admits that "*Booker* did not rule on the
18 standard of proof required under the advisory Guidelines."
19 Defendant's Motion Re: Procedure on Remand at 19. The court thus
20 finds that absent a Ninth Circuit or Supreme Court ruling to the
21 contrary, the standard of proof for fact-finding at sentencing
22 remains unchanged: by a preponderance of the evidence, except on
23 such issues as have an extremely disproportionate effect on the
24 length of the defendant's sentence, which require finding by
25 clear and convincing evidence. *United States v. Thomas*, 355 F.3d
26 1191, 1202 (9th Cir. 2004).

IV. CONCLUSION

In light of the foregoing, the court invites the parties to submit briefing concerning any perceived remaining issues, and in preparation for a sentencing hearing, tentatively scheduled for 10:00 a.m., September 14, 2005. Defendant shall submit a principal brief no later than September 2, 2005; the government's response is due September 8, 2005, and the defendant may submit a reply, if any, on September 12, 2005. The briefs shall not exceed 12 page each.

The May 26, 2005 Order is hereby withdrawn; the defendant's Motion for Clarification and the government's Proposed Order Regarding Psychological Examination and Moreland's objections thereto are stricken as moot.

Dated at Seattle, Washington this 2nd day of August, 2005.

Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE